



Reliance Metals Ltd & another v Vejordia Garden Villa Ltd & another (Environment & Land Case 277 of 2015 & 33 of 2016 (Consolidated)) [2024] KEELC 5214 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELC 5214 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 277 OF 2015 & 33 OF 2016 (CONSOLIDATED)
FM NJOROGE, J
MAY 23, 2024**

BETWEEN

RELIANCE METALS LTD PLAINTIFF

AND

VEJORDIA GARDEN VILLA LTD DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 33 OF 2016

BETWEEN

VEJORDIA GARDEN VILLA LTD PLAINTIFF

AND

RELIANCE METALS LTD DEFENDANT

(As consolidated with NAKURU ELC NO 33 OF 2016 - VEJORDIA GARDEN VILLA LTD VERSUS RELIANCE METALS LTD)

JUDGMENT

Introduction

1. The first of these two suits Nakuru ELC 277/15 which is the lead file in this consolidated judgment was filed on 27/10/2015 by the plaintiff, Reliance Metals Ltd vide a plaint dated 7/10/2015 through Kanyi Ngure & Co. Advocates which was subsequently amended on 16/10/2018. The defendant filed a defence through Robert Ndubi & co Advocates on 9/2/2016 which was also amended on 5/11/2018 to include a counterclaim and to which the plaintiff filed a reply on 26/11/2018



2. The second suit, Nakuru ELC NO 33 OF 2016 was filed by Vejordia Garden Villa Ltd on 9/2/2016 vide a plaint dated 4/2/2016 by the same advocate who lodged the defence in the first suit, that is Robert Ndubi & co. This time round, the statement of defence dated 4/10/2016 was filed in the second suit on 5/10/2016 by the firm of Geoffrey Otieno & Co Advocate who finally took over the conduct of the entire consolidated suit on behalf of the plaintiff.
3. On 9/3/2016 the two suits were consolidated by the order of Munyao J. In the consolidated suit the order and capacities of the parties will be as per the title in NKR ELC 277 of 2015. I will in this judgment alternately refer to the parties simply as “Reliance” and “Vejordia”, or “the plaintiff” and “the defendant” respectively in NKR ELC 277/2015 for good order. Hearing began with the hearing of evidence of the defendant’s witnesses on 27/11/2017 after the witnesses for the plaintiff in the lead file failed to turn up. This however adversely affects nothing in terms of procedure as each of the parties’ respective claim is the same in either case. The defendant’s case was thus heard on 16/6/2019, 19/1/21, 17/5/21, 2/12/21, 27/2/23 and closed on 3/3/23. Later, the plaintiff’s case was heard and closed on 13/6/23. Owing to the events that led the defendant’s case being heard first, my analysis of the evidence in this case will follow the order of hearing and will not depend on which is the lead file.

Pleadings.

Defendant’s Pleadings.

4. The defendant’s case is contained in its plaint dated 4/2/16 in NKR ELC 33/16 and also the amended statement of defence and counterclaim dated 5/11/2018 in NKR ELC 277/15. In brief, the defendant’s claim is that it was a tenant to the then owner on the suit land when the suit property known as Nakuru Municipality Block 4/54 was advertised by a bank for sale. The owner was indebted to the bank and the bank as using its powers of sale initiated recovery by way of sale by auction. The parties herein mutually entered into a legally binding sale agreement by which upon successful bid for the suit land by the plaintiff, it would sell to the defendant half of the property to include the portion the defendant was in occupation of; that however the plaintiff later breached that agreement and failed to recognize it and termed the defendant a trespasser and attempted to obtain vacant possession from the defendant.
5. The pleadings state that the defendant stated that it operates a bar and restaurant business on LR No Nakuru Municipality Block 4/54 which it admits was at the time of filing suit registered in the plaintiff’s name. However, it denied ever having been a tenant to the plaintiff or that it has ever been issued with notice to vacate the suit property, and further added that any such notice would not apply to it anyway. It stated that sometime in 2010 when a banking institution advertised and sought to sell the suit property by way of exercise of its statutory power of sale, the parties herein agreed that the plaintiff was to bid at the auction and if its bid succeeded, it was to sell to the defendant half of the suit property. The plaintiff’s bid succeeded and by an agreement dated 15/11/2010 the parties agreed that the plaintiff would sell half of the property to the defendant, and the defendant paid a deposit of Kshs 2,000,000/= while the balance of Kshs 15,000,000/- was to be financed by a bank subject to registration of a charge over the purchased portion in its favour and a new title issued to the defendant. After this the defendant developed its portion with modern business facilities at a great expense and the building plans thereof were signed by the plaintiff; only the occupants of the portion that went to the plaintiff were required to vacate after the land was purchased at the auction. The defendant remained on the suit land. The parties jointly employed one surveyor who pursued survey, planning, change of use, approvals and subdivisions in the larger exercise of subdividing the suit property into two portions. Final subdivision approval was issued by the Commissioner of Lands in 2012 and the plot was subdivided into plots nos 470 and 471 and the Registry Index Map (RIM)



amended accordingly. The plaintiff was assigned portion no 471. In the meantime, the defendant secured financial accommodation from a bank to the tune of Kshs 15,000,000/= intended to be secured by a charge over its portion of land which loan was later cancelled for non-co-operation by the plaintiff's lawyers who, citing spurious reasons, failed to avail the necessary documents for registration of the charge. Later in 2014 the defendant received financial accommodation a second time from a different banking institution to pay the balance of the purchase price but the defendant refused to accept payment and further refused to avail the original title for the purpose of registration of the charge. The plaintiff has not only refused to acknowledge the existence of the agreement between the parties but also acted in breach thereof and threatened to evict the defendant from the suit property on the basis of a claim of alleged trespass. The defendant denied trespass and the claim for mesne profits. The defendant averred that the plaintiff is only entitled to only half of the suit property.

6. The defendant thus sought the following orders in its plaint dated 4/2/2016:
 - a. An order for specific performance to have the agreement dated 15th November 2010 specifically performed;
 - b. Damages for breach of the said agreement;
 - c. A permanent order of injunction to restrain the Defendant from entering onto, trespassing or interfering in any manner with the Plaintiff's quiet and peaceful occupation of a half portion of the property now known as Nakuru Municipality Block 4/471 as the subdivisions specified in the RM amended;
 - d. Costs of this suit.
7. It also sought the following orders in its amended defence and counterclaim dated 5/11/2018:
 - a. An order of specific performance of the sale agreement dated 15th November, 2010;
 - b. Damages for breach of contract;
 - c. Costs of the suit.

Plaintiff's Pleadings.

8. The plaintiff's case is contained in the amended plaint dated 16/11/2018, the reply to amended defence and defence to counterclaim dated 26/11/2018 all filed in NKR ELC 277/15, and the defence dated in NKR ELC 33/2016. In brief the plaintiff's case is that it is the registered proprietor of the suit property having purchased the land and the developments then existing thereon at the public auction on 13/10/2010. After that it waived rent payments for the period of the notice to vacate which it issued to all tenants on the suit land including the defendant requiring them to surrender vacant possession within 60 days with which the defendant failed to comply.
9. The plaintiff admits that there was an arrangement by the defendant to obtain financing to purchase the portion that it occupied but asserts that no formal agreement was ever entered into for the purpose and the sale fell through, and that the defendant has never paid any money or compensation to the plaintiff for its occupation of the premises. The plaintiff avers, just like the defendant that there is no landlord-tenant relationship between the parties herein and adds that the defendant is a trespasser. It avers that no consideration had passed to it to enable the defendant have a charge registered over half of the suit property. The plaintiff denied ever executing any sale agreement on 15/11/2010 for sale of half of the suit property or ever receiving any deposit of Kshs 2,000,000/- from the defendant and terms the sale agreement a forgery and which is which is unenforceable and accuses the defendant of fraud. It claimed that the continued occupation by the defendant is occasioning it considerable loss in respect



of repayment of the loan it acquired for the purchase of the property, and also its inability to demolish the existing structures in order to develop a high rise business complex that would enable it service that loan. The plaintiff seeks the following prayers in the amended plaint:

- a. An order of declaration that the sale agreement dated 15th November, 2010 is fictitious, false and a forgery and thus the same is unenforceable as against the Plaintiff-Company over its proprietary interests on the suit property Nakuru Municipality Block 5/45 measuring approximately 0.4027 Hectares;
- b. A declaratory order that the Plaintiff is entitled to exclusive and unimpeded possession of the suit property NAKURU MUNICIPALITY BLOCK 4/54 approximately 0.4027 Hectares and that the Defendant is a trespasser occupying the Plaintiff's parcel unlawfully;
- c. Eviction orders and/or mandatory injunction orders for vacant possession against the Defendant to move out of parcel NAKURU MUNICIPALITY BLOCK 4/54 belonging to the Plaintiff immediately failure to which the Plaintiff to seek the services of licensed court bailiff with the assistance of the O.C.S Central Police Station, Nakuru so as to evict the Defendant;
- d. A permanent injunction restraining the Defendant or its servants/agents from interfering, remaining, using and/or in any way dealing with all that parcel of land known as Nakuru Municipality Block 4/54 measuring approximately 0.04027 Hectares in a manner that would prejudice the Plaintiff's registered interest on its said parcel;
- e. An order for payment of mesne profits amounting to Kshs 11,400,000/= calculated at an assessed monthly rent of Kshs 200,000/= for the period running between January, 2011 to 30th October, 2015 and the payment of mesne profits to include any other or further period as the court may direct until the time when the defendant surrenders vacant possession of the suit property.
- f. Costs and interest at court rates.

Evidence Of The Parties

Plaintiff's Evidence

10. PW1, Veronica Wanjiru Waciuri gave evidence for the defendant. According to her, she is one of the directors of the defendant company, the other directors being her daughter and her son. The defendant's business occupies half an acre of the suit land. The defendant was a tenant while the suit land was owned by Heiwa Auto Spares, occupying half an acre while another tenant occupied the other half.
11. In 2007, the landlord offered to sell the property at Kshs 18,000,000/- for 1 acre to enable him repay a loan owed to Barclays Bank. The defendant and the Landlord signed an agreement and the defendant paid Kshs 3,000,000= . The balance was to be paid upon the Vendor obtaining a title.
12. However, the landlord failed to repay the loan and the intended sale arrangement between the landlord and the defendant fell through and the Bank soon began making demands for payment upon default of which the suit premises would be sold. At that point, PW1 spoke with her husband Joseph Kigen and they agreed to purchase the property at an Auction. They teamed up with Mukesh Patel, her husband's friend for a joint bid. Mukesh suggested that a company be formed by four people- PW1, Joseph Kigen, Mukesh Patel, and one Rakesh. A company, Falklands Enterprises Ltd (herein Falklands)



was then formed and registered on 17/8/2010 whose directors included Trushna Mukesh Bhai, the wife of Mukesh Patel. Mukesh was not a Director.

13. They however did not purchase the property at the auction using Falklands as Mukesh is said to have disagreed with Rakesh and Falklands could not then be used for the purpose. Mukesh then suggested that the parties do use the Plaintiff Company in which he and his wife were directors. The Auction occurred on 13/10/2010 and PW1 attended it alongside Mukesh and Joseph and one Bhupendra Maribhan Patel (Manywele). They travelled in Mukesh's vehicle to Nairobi. The Auction took place on 7th Floor of Cannon House along Haile Selassie Avenue. A bid of Kshs 30,000,000/- by the Plaintiff was accepted. A sum of Kshs 7,500,000 was paid on the auction day with the defendant contributing Kshs 1,000,000/- into that sum. The Kshs 1,000,000/= was given to Mukesh. After the auction an agreement was prepared to the effect that Reliance would sell half of the property to the Vejordia for Kshs 17,000,000/-. Mukesh agreed that the defendants could get a loan to pay half of the Kshs 30,000,000/- on condition the defendant would pay interest, hence the purchase price increased to Kshs 17,000,000/-.
14. The Sale Agreement was executed on 15/11/2010. It was drawn by an advocate. PW1, her daughter and Mukesh and his wife went to the Advocates office and executed the agreement as the advocate witnessed the auction. An advocate called Kipchenger witnessed the agreement. At the execution of the agreement, Mukesh sought and was given Kshs 1,000,000/= by the plaintiff, leaving a balance of Kshs 15,000,000/= outstanding which according to PW1 would be paid when Mukesh availed the title to the Bank that was to issue a loan to the plaintiff. PW1 took an original signed copy of the agreement to Equity Bank Kenyatta Avenue Branch Nakuru, as well as a transfer by Chargee issued by Barclays Bank, the Plaintiff KRA Pin, Certificate of Incorporation as well as Trushna Mukesh's passport and gave these documents to Equity Bank (herein after "Equity"). The Defendant had applied for a loan from Equity. The bank asked that the premises be subdivided and the process commenced.
15. The parties approached Ecoplan Management Ltd to do the subdivision whose expenses were shared equally between the parties. A Mr. Keter did the work and he charged Kshs 50,000/- as his fees. The subdivision was approved by the Municipal Council of Nakuru. PW1's husband was following up the process. A Certificate of Compliance dated 24/4/2011 was issued to Ecoplan Management Ltd by the Director of Physical Planning. A Surveyor, Mr. Kibowen from Wahome Werugia Licensed Surveyors was then instructed by the Plaintiff. He charged Kshs 20,000/=: which was shared equally by the parties herein. Equity Bank then issued a letter of offer for Kshs 13,600,000/= on 17/1/2011 for the purpose of financing the purchase of half of Nakuru Municipality Block 4/54. The title to that half portion was to be security for the loan offered. PW1 signed the Letter of Offer in the presence of an advocate, Jane Wamboi Ndungu. Equity Bank gave an offer letter for Kshs 13,600,000/= which sum was not released. The bank instructed Lawyer Mutitu Thiongo to prepare the necessary documents. The advocate sent the plaintiff a letter dated 18/3/2011 and another dated 9/2/2011. Mutitu Thiongo advocates gave a professional undertaking to Kanyi Ngure & Company Advocates who were acting for the plaintiff and asked them to forward documents for the portion that was to be charged so that they could register the charge. They also sent the plaintiff another letter of undertaking dated 15/2/2011. Another letter dated 8/4/2011 written by the same firm asking for expedition of the response to the previous letters. Yet another letter dated 19/9/2011 was written to Kanyi Ngure advocates protesting the delay in response to the previous correspondence. During the period of the said correspondence subdivision was going on. The County Government had no objection to the subdivision and the Ministry of Lands authorized subdivision and change of user through a letter dated 19/4/2012. The change of user was from residential to Commercial. PW1 produced a letter and a receipt for the amount paid for the approval. Final approval was given in a letter from the Ministry dated 19/4/2012 and the plot was subdivided. The proposed subdivision scheme was signed by Mukesh's wife Trushna and PW1 on



19/11/2010. The proposal was approved by the District Physical Planner Nakuru and the Municipal Council of Nakuru. Two portions “A” and “B” were to result and the defendant was to get the title for portion “B” in its name. The Registry Index Map was amended after the subdivision and plot “A” was allocated Number 470 and Plot “B” was allocated Plot Number 471. No complaint was ever raised by the Plaintiff during the subdivision and change of user exercise. The Defendant asked Mukesh if it could construct a kitchen and he had no objection. A permanent kitchen house was constructed with no demur from the Plaintiff. Drawings or building plans for the kitchen were also approved and PW1 paid Kshs 9,198/= for them. James Njuguna, a tenant of the other half of the premises not occupied by the defendant sued the plaintiff herein after the auction claiming right to enjoy his lease to the end of its term. That lease also made it impossible to transfer the plot as had been planned. The defendant then asked Mukesh whether it could offer another security for the loan, in view of the court case. Nakuru Municipality 11/77- Milimani was offered as security for financing to the tune of Kshs 22,131,326/- from Consolidated Bank and the funding was released to the defendant, whereupon it informed the plaintiff that it was ready to pay the balance of Kshs 15,000,000/= and deposited the money with its lawyer, who wrote to the plaintiff’s lawyer on 25/2/2014 asking for documents. The defendant’s advocate notified the Plaintiff vide a letter dated 8/5/2014 that it had received no response from the Plaintiff. Thereafter the Plaintiff filed suit against the defendant. PW1 stated that currently the sum of Kshs 15,000,000/- is held in the joint account of the plaintiffs and the defendants Advocates at Consolidated Bank Ltd.

16. Upon cross-examination by Mr. Otieno for the Plaintiff PW1 stated that she did not have any written acknowledgement of receipt of the Kshs 1,000,000/- from Mukesh because the latter never gave her any. She stated she had paid the money to him in cash. She stated that the Kshs 1,000,000/- paid at the execution of the agreement on 15/11/2010 was given to Mrs Mukesh on behalf of the Plaintiff. According to PW1, completion was not possible within 30 days since the seller did not release the documents to the purchaser. She stated that she gave to the plaintiff copies of the receipts she got during the subdivision process. She admitted the receipt for consent to transfer was given in the name of Robert Ndubi & Company Advocates who acted for the defendant and that the consent to transfer, albeit issued to the plaintiff was forwarded through that legal firm too. She stated that she had never received any demand to vacate from the suit property from Kanyi Ngure & Company Advocates and that no payment of rent was required of the plaintiff. She denied forging the sale agreement. She alleged that the Plaintiff wants to resile from the agreement simply because the value of the property has appreciated.
17. PW2, Joseph Kipkemoi Kigen, a contractor, sworn, gave oral evidence and adopted his witness statement dated 2/8/2017 as part of his evidence-in-chief. He testified that the directors of the defendant company are Veronica Wanjiru Waciuri (his wife), John Waciuri and Lydia Waciuri. Vejordia started occupying Nakuru Municipality Block 4/54 as a tenant in the year 2006 by operating a bar and restaurant business. The landlord was then Haiwa Autospares Ltd (hereinafter “Haiwa”). After some time, Haiwa Autospares decided to sell the property. Haiwa had acquired a bank loan from Barclays bank. The bank advertised the property for sale in 2010. PW2 then looked for some friends so that they could jointly purchase the property at the auction. He got 4 friends including Patel Mukesh and Rakesh Gudka and they agreed to form a company to buy the land. Out of the 4 friends, only 2 finally agreed to form a company, Falklands Enterprises Ltd: Rakesh Chanlal Mepa Gudka, and Trushna Mukeshbhai. The other two directors were PW2 and his wife. They did not participate in the auction using Falklands. Disagreements arose between Patel Mukesh and Rakesh Gudka. The partners then decided to use Reliance Metal Ltd, the plaintiff company herein, to bid since PW2 trusted Mukesh as a friend. The auction was held at Keysian Auctioneers’ Building in Nairobi on 13/10/2010. PW2 travelled to Nairobi with his wife, Manubhai Bhupendra and Patel Mukesh using



Mukesh's vehicle. The Kshs.30 million bid by Reliance Metals succeeded. Kshs.7.5 million was paid as deposit on the date of the auction. Vejordia (the defendant herein) raised Kshs.1 million while Mukesh raised Kshs.6.5 million so as to make the Kshs.7.5 million deposit. There was already an arrangement between Vejordia and Reliance that each company would take half an acre of the land. On 15/11/2010 the parties went to Cheptumo & Co. Advocates, to draw the agreement between Vejordia and Reliance Metals. On that date, PW2 went with his wife and daughter Lydia to Cheptumo & Co. Advocates' offices. From there he went to Mukesh's home to pick him and take him to the advocate's office to sign the agreement. Mukesh and his wife decided to go in their own vehicle. PW2 was present when they signed the agreement. Mukesh and his wife signed for the vendor in the presence of Mr. Kipchenger Advocate. Vejordia paid the plaintiff Kshs.1 million on the date of signing the agreement. Through the agreement, Vejordia was buying half an acre at kshs.17 million. Although the auction price was Kshs.30 million, Mukesh said he had borrowed money to pay the purchase price. PW2 was present at the signing of the agreement. The directors of Reliance acknowledged receipt of the deposit of Kshs.2 million in the agreement. The balance of Kshs.15 million was to be paid within 14 days of registration of a charge over the portion that Vejordia had purchased. Mukesh and PW2 agreed that the latter was to follow up the processing of the title. Mukesh, PW2 and Kibowen (a surveyor) met in Nakuru and instructed Kibowen to subdivide the land. He charged them Kshs. 30,000/=. They also engaged Eco Planners Management to do the drawing and they were to pay Kshs. 50,000 for the work. They agreed to share the charges of Kibowen and Eco Planners equally. PExh.13, the proposed subdivision and change of user was signed by Trushna and PW2's wife Veronica on 19/11/2010 i.e. 4 days after the sale agreement was signed. The proposed subdivisions were identified on the sketch as "A" and "B". The portion that Vejordia was to acquire was "B". PW2 personally followed up approvals from the Municipal Council. He held originals of some of the correspondences while he gave others to Mukesh. He was also making follow up with Ministry of Lands headquarters Nairobi. He produced PExh.21 a letter from the Ministry of Lands dated 26/3/2012 by which the parties were informed of provisional approval for the subdivision and change of user and which advised them to pay for the subdivision the amount of Kshs. 5,500/= The plaintiff accepted the terms and through a letter dated 19/4/2012 final approval was given. PW2 paid it by cheque vide a receipt dated 10/4/2012 (PExh.11.) The survey process was completed and the parcels were given new numbers 470 and 471. Vejordia's parcel was 471. Mukesh was to surrender the original title documents so that new titles would be issued; however, he told PW2 that he was making arrangements but he did not surrender them. Several letters were written to Mukesh's lawyers by Equity Bank who were guarantors of Vejordia. There was no reply to any of the letters and PW2 went to inquire from Kanyi Ngure & Co. why they were not replying. The firm informed him that they were awaiting instructions from the bank. The letters referred to the sale transaction. Vejordia has never been a tenant of Reliance, and PW2 is the one who brought Reliance into the transaction. Since Equity did not give Vejordia any money, the latter obtained another loan of Kshs.15 million from Consolidated Bank, and the said amount is currently deposited in an account in the names of lawyers for Reliance and Vejordia.

18. PW2 produced an OB Extract of OB59/12/11/2018 vide which the complainant Mukeshbhai Patel had reported that the sale agreement in this case was a forgery. PW2 denied that Mukeshbai had given a true report. He stated that Reliance did not get to know of the agreement in November 2018; that by November 2018 these two cases had been filed and Vejordia had already filed the sale agreement. He pointed out a letter dated 19/4/2011 from Mukesh Patel's lawyers, Kanyi Ngure & Co. Advocates to Mutitu Thiongo & Co. Advocates acting for Equity Bank who were financing Vejordia Garden Villa to pay for the plot; that letter said Vejordia were entitled to own ½ share of Nakuru Municipality Block 4/54 and regretted that there was no response, stated that the undertaking by Mutitu could not be accepted as Vejordia had not bought the half plot; it suggested that Equity Bank do finance the purchase of the ½ portion and also that the defendant had the option of obtaining collateral other than the suit



land. He stated that all the correspondence occurring in 2011 between the advocates speak of sale of half portion being plot Block 4/54B. The intent was to have the half plot transferred and charged to the bank. Consequently, he stated, Mukesh cannot go say they did not know of the sale agreement.

19. Upon cross-examination by Mr. Otieno he stated that upon payment at the auction, Vejordia neither received any written acknowledgment or any receipt from Mukesh nor from the Auctioneer. He stated that Vejordia also paid another Ksh. 1,000,000/= through Veronica in cash. There also was no acknowledgement in writing for that payment. Cheptumo & Co. Advocates witnessed the agreement. One Bhupendra was in partnership with Mukesh and two others who were purchasing the property. Vejordia never made any payments directly to Bhupendra who has never been a director of Reliance and who passed away in 2015. All along, PW2 knew Reliance had Kanyi Ngure as their Advocates. PW2 does not know why Kanyi Ngure were not included in the making of the agreement, but Vejordia's directors did not know of Kanyi Ngure advocate's role prior to the agreement. Kipchenger, an advocate, witnessed the Kshs. 1,000,000/= paid in Nairobi after the auction. PW2 stated that though 30 days was the completion period he did not recall any demand coming from Reliance asking for compliance with the terms of the agreement. He maintained that Mukesh Patel and his wife executed the agreement but only their signatures appear and the names do not appear. He did not know why the names and ID Numbers do not appear on the agreement. Evans Kipchenger was an employee of Cheptumo Advocates. He does not know whether Equity Bank gave an undertaking. Though he is not a director of Vejordia and never signed the agreement of 15/10/2010, Veronica (PW1) is his wife and he is involved in the daily business of Vejordia. The original agreement was taken to Equity Bank. Vejordia had bought half of the property and they could not therefore pay rent. An attempt to buy the suit land from the previous owner was made in March 2009. He denied that Vejordia was not able to raise Kshs.15 million. They had paid for subdivision fee and change of user. There was a letter from the plaintiff approving the process; they had walked with Reliance's directors and the Surveyor during the process. PW2 personally delivered the letter of 19/4/12 from Ministry of Lands to Reliance. It reads "proposed subdivision" and "P.O Box 255, Eldoret" which is not their known address. Though in his witness statement (paragraph 27) he had stated that he had paid Kshs. 990,000/= by cheque, he did not have a copy of the cheque to confirm this statement. However, he stated that that money was not part of the agreement. He denied the allegation that the sale agreement was fictitious.
20. Upon re-examination by Mr. Ndubi PW2 stated that the money acquired and deposited in an account on the orders of this court (Kshs. 15,000,000/=) was not for purchase of another property and it was indeed not applied to any other property. The money is available having been secured by way of court order. Clause 3 (1) 1) (ii) of the agreement) provided that the balance of Kshs. 15,000,000/= was to be financed and was to be paid upon issuance of title for half of the property in the name of Vejordia who was to use that title as security. There was another court case between the plaintiff and a tenant. The tenant placed a caution at the lands office which took the case 5 years to finalise. Vejordia was able to get alternative security. He only facilitated transport for Mukesh and his wife to the Advocates office and never entered the office of the lawyer. He left them with the two directors of Vejordia as he had no role to sign the agreement. Vejordia were in occupation as at the date of the agreement which was part performance of the agreement. No one ever called for rent from Vejordia. He realised there was a problem when eviction proceedings were commenced in case number Nakuru ELC 277/2015. The finance from Equity Bank was only for a portion of the land. The Bank had the sale agreement. PW2 was personally involved in the processes at lands office for change of user and subdivision. Reliance signed a subdivision Plan through Mukesh's wife and Vejordia through PW2's wife. There is nothing Vejordia did without Reliance's knowledge and there was no forgery.
21. PW3, Emanuel Karisa Kenga, a forensic document examiner, sworn stated that he has 30 years' experience in his craft. He received a number of documents from Robert Ndubi & Co. Advocates –the



- agreement dated 15/11/2010, a resolution to commence suit, witness statement of Trushna Mukesh Bhai Patel, and Memorandum & Articles requesting him to do an analysis on the signatures and his conclusion was that the signatures on the agreement were not forgeries.
22. Upon cross-examination by Mr. Otieno PW3 stated that though he retired in March 2018 he has the licence to practice as a private document examiner. He has a company vide which he operates but he had no proof of that fact in court; he admitted that there were no specimen signatures submitted to him and his comparison was done using the questioned signatures on the agreement and the known signatures on the resolution to commence suit, statement of Trushna Mukesh Bhai Patel, and Memorandum & Articles of the Plaintiff company.
 23. Upon re-examination by Ndubi, PW3 stated that the documents submitted for analysis were clear and legible and fit for analysis and the known signatures were written earlier and undisputed, one being on a statement of a witness and that he conducted the analysis professionally and accurately.
 24. PW4 Geoffrey Kibowen, sworn, stated that he is a Land Surveyor, at the Ministry of Lands and Physical Planning based at Headquarters of Survey of Kenya. In 2014 he was a Land Surveyor at Nakuru office and was engaged by Mr. Mukesh and Mr. Joseph Kigen (PW2). They met at Garden Villa and also at the Municipal Council offices and Seasons Hotel. Instructions were issued by Mukesh and Kigen who said that they had bought the property and they wanted it subdivided equally. He was paid about Kshs. 30,000/= . The two split the expenses. He received Kshs. 10,000/= from Mukesh. He provided the subdivision services in respect of the property. Several approvals were needed, including the Municipal Council approved subdivision scheme plan. He carried out the ground survey, fixed the beacons, determined the boundaries, established a survey file and drew a survey plan. By then he was not licenced to practice. He gave these to Werugia, a licenced surveyor who forwarded them to the Director of Surveys on 16/5/2012. He forwarded 2 plans, (original of copy; 2 leaves of survey field notes; 9 pages of survey computations; approval letter 22913/42 from Commissioner of Lands and a copy of the approved PDP. The whole land was 1 acre. The survey process was completed, survey approved and authenticated. Subdivisions were given new numbers, Nakuru Municipality Block 470 and 471. The parties got half an acre each. Vejordia's plot is 471. Reliance's is 470. Vejordia was to occupy half acre where it is situate and the other party was to be on the other remaining parcel. There was an amended RIM. PW3's mandate then ended. Processing the leases was not his mandate. To process leases, the amended RIM is sent to Director of Land Administration and Chief Land Registrar. The Commissioner of Land and Director must receive a surrender of the old lease to issue new leases. The old parcel No. Nakuru Municipality Block 4/54 does not exist anymore.
 25. Upon cross-examination by Mr. Otieno PW4 stated that the instructions given to him were verbal, not written. He met with the directors of the two companies present and he believed that they were their respective company's representatives. He was paid in cash.
 26. PW5, Evans Korir Kipchenger sworn, stated that he is an Advocate of the High Court practicing and having an office in Nakuru under name and style of Kipchenger & Co. Advocates. He practiced as an associate in Cheptumo & Co. Advocates in Nakuru in 2010. On 15/11/2010 at about 1:00 p.m. He prepared the agreement and witnessed the parties' signatures the sale agreement herein drawn by Cheptumo & Co. Advocates. As of that specific date he did not know the parties. On that date he was in the office; 3 persons Joseph Kigen, Veronica Wanjiru and Lydia came to the office. PW5 was informed by Nicholas Chelimo Chebet, a trainee Advocate (now deceased) that the 3 persons want to execute an agreement and he asked if the purchaser and the vendor was among the 3. Kigen stepped out to fetch the vendor. Two persons of Asian descent were introduced as the vendors. The vendors were a man and a lady whom he understood to be a couple. PW5 stated that the original agreement could still be at Cheptumo & Co. Advocates. In 2011, PW5 left the firm of Cheptumo & Co. to begin



his own firm. He however confirmed that it was his signature and stamp appearing in attestation on the agreement executed by the parties herein. He still has the stamp which he used on that day. He produced a copy of the agreement as PExh.3. PW5 obtained instructions that an auction had occurred earlier and Kshs. 1,000,000/= which the purchaser had contributed had been paid. It was his evidence that a further Kshs. 1,000,000/= was paid on the date of execution of the agreement.

27. Upon cross-examination by Mr. Otieno PW5 stated 2019 PW5 was summoned to DCI office over the transaction. In respect of payment of the Kshs. 2,000,000/= there was no other form of acknowledgment save in the agreement. The firm of Cheptumo did not receive any undertaking or handle any other documents regarding the transaction. He was a joint advocate for the parties and he never received any undertaking or any title document with regard to the agreement neither did they never conduct any search. He never saw the certificate of lease for plot No. Nakuru Municipality Block 4/54 issued in June 2011 but Nicholas was in touch with the parties. PW5 did not confirm their directorships of the respective companies and had not met the said persons before. They did not address the issue of resolutions. They normally do 3 originals of an agreement, one to vendor, one to purchaser and one for the file record. PW5's evidence marked the close of the plaintiff's case.

that it was a once-off transaction and maintained that the agreement was made in his office and that he perused it together with one Nicholas, a fellow employee in the office. For Reliance, a gentleman called Mukesh and a lady called Trushna appeared. On the purchaser's side Veronica Wanjiku and Lydia Wamuyu appeared but the names and identity card numbers of these persons do not appear anywhere on the face of the agreement. The vendors never objected at the point of signing though there was no seal appended by the companies only the signatures. Copies of the identity cards of those persons were taken. The purchasers came with an envelope and they passed it on to the vendors. In

Defendant's evidence.

28. DW1, Mukesh Ambalal Patel sworn gave oral evidence and also adopted his witness statements filed in court on 16/10/2023 and 7/10/2015. He relied on the bundle of documents filed and produced the copies in the bundle as exhibits. His evidence is that he and his wife Trushna Patel are co-directors in Reliance Metals Ltd. One Rohit Patel is also a director. According to his evidence, the plaintiff owns LR No. Nakuru Municipality Block 4/54 which it acquired through a public auction, and on which defendant is a trespasser. The plaintiff holds a certificate of lease dated 22/6/2011. He came to know of the auction through Joseph Kigen and Veronica (PW2 and PW1 respectively) who were by then tenants on half a portion of the suit land. He further learnt of the auction through a newspaper advert of 12/10/2010. He attended the auction on 13/10/2010 at Nairobi. Keysian Auctioneers were selling the land on behalf of Barclays Bank. He was the successful bidder at Kshs. 30,000,000/=. On the same date they paid Kshs 7,500,000/=. Balance was to be paid in 60 days. They were given a certificate of sale and a memorandum of sale. There was an oral agreement with the defendant that it was to pay Kshs. 17,000,000/= for the half portion within 60 days. It never paid that sum and the plaintiff paid the balance through finance from Dubai Bank within the 60 days granted at the auction. The original certificate of lease is with I & M Bank. Trushna Patel (DW2), Rakesh, Joseph Kigen(PW2) and Veronica (PW1) were the directors Falklands. It was formed to make plastic products and not for the purpose of holding shares in the suit property. It did not finance the transaction. 4 demand notices were issued to the defendant requiring it to vacate the property. Other tenants on the property vacated vide a court order dated 1/4/2015. The plaintiff claims mesne profits. A valuer, Metrocosmo Ltd did a valuation for the plaintiff. The suit property can fetch about Kshs. 130,000,000/= in the market. According to DW1, PExh3, the agreement dated 15/11/2010 is a forged document which he never signed. It does not have any names of directors and lacks a seal. He has never seen its original. The title the plaintiff holds was issued 22/6/2011. The plaintiff never received Kshs. 2,000,000/= from the



- defendant as down payment. Kanyi Ngure, was their advocate from 2008 and he was the lawyer the plaintiff would have engaged for such agreement if need had arisen. The agreement is 13 years old yet the completion period is 30 days. It is thus overtaken by events. There was no notice from the defendant alleging the agreement's terms were not being observed. Mutitu Thiongo advocates wrote to Kanyi Ngure advocates on 15/2/2011 and on 18/3/2011. Kanyi never received the letter dated 25/2/2014 (PEXh.18) or letter dated 24/4/2014 (PEXh.17). They made a formal report to the police through OB 59/12/11/2018 but the officer dealing with the complaint was transferred and DW1 is not aware of any progress in the processing of the complaint and so this case was filed.
29. When shown a letter dated 2/6/2011 from Robert Ndubi advocate seeking consent to transfer the suit land from the land officer Nakuru, he categorically stated that the plaintiff had never instructed Mr. Ndubi to seek consent to transfer to procure the suit land. DW1 is aware there was a Kshs. 15,000,000/= deposited in the parties' Advocate's joint account. He prayed that the prayers in the plaint be granted.
30. Upon cross-examination by Mr. Ndubi, DW1 stated that there was a letter requesting issuance of the Commissioner of Lands' consent to transfer. The consent was mandatory and the plaintiff has no consent other than DEXh.22, a consent dated 2/6/2011 which he had denied instructing Mr Ndubi to seek. He admitted that the plaintiff got a certificate of lease on 22/6/2011 pursuant to that consent. He admitted that it was Joseph Kigen PW2 who approached him and told him of the auction of the suit property. Joseph Kigen wanted to buy half the portion and the plaintiff the other half for both parties to team up to purchase the property. Falklands Company was incorporated at the time of the auction. There was not any other transaction between DW1 and his wife on the one hand and Joseph and Veronicah on the other hand save that regarding the suit property. Bhupendra Patel was not involved in the purchase. DW1 and Bhupendra went by car to the auction; DW1 could not recall if Joseph Kigen and Veronicah were in the same car; he did not know the other bidders; after the auction, on 13/10/2011 parties had agreed verbally that half of the suit land would be sold to the defendant Kshs. 17,000,000/=; the balance as per the agreement was Kshs. 15,000,000/= to be paid upon successful registration of a charge over the same property. He admitted that the signature on the agreement looks like his and the other one looks like his wife's. Legal work was done by Mr. Kanyi Ngure. He has never been to the office of Kanyi Ngure. He lives along Kenyatta Avenue at the town centre. He and his wife made and signed statement with the police. They never provided specimen signatures to a document examiner. They took a loan. The certificate of lease is with the bank. The loan with I & M Bank is not repaid yet. He admitted that they supplied their documents to Vejordia and Joseph Kigen sought change of user of the property. DW1 was aware that his wife signed the subdivision plan in respect of Plot No Nakuru Municipality block 4/54 exhibited by the plaintiff; there is another signature on that document beside his wife's whose author DW1 does not know. Vejordia occupies portion No. B in the subdivision plan and in the letter Mutitu Advocates wrote to Kanyi Advocate on sale of half portion the portion for sale to defendant is named "plot No. Block 4/54B". The plaintiff's advocate wrote to protest that there was no sale agreement with Vejordia. The plaintiff had wanted Kshs. 17,000,000/= within 60 days. In the court case seeking vacant possession the plaintiff never sued Vejordia. They had given Vejordia 60 days from date of auction. The plaintiff moved to court in 2015 seeking vacant possession yet they had sued the other tenants in 2011. The Kshs. 15,000,000/= was deposited into a joint interest earning account between or advocate and theirs. The subdivision/change of user was done by the defendant. The the subdivision and change of user were effected as a result of the verbal agreement.
31. Upon re-examination by Mr. Otieno, DW1 stated that Falklands Ltd was incorporated by himself, his wife, Joseph Kigen and Rayesh to engage in plastic items production. They however never commenced any new enterprise. He further stated that the defendant wanted to charge the entire plot of Kshs. 30,000,000/= for a loan of Kshs. 13,000,000/= and DW1 did not think it was proper to do so.



32. DW2, Trushnar Mukesh Bhai Patel gave sworn oral evidence and adopted her witness statement dated 16/10/2018. She was aware that there were talks aimed at allowing the defendant to own a half of the property but there was no formal sale agreement because the defendant failed to pay Kshs. 17,000,000/= being its part of the consideration. Reliance purchased the land through a public auction for Kshs. 30,000,000/=. She never attended the auction personally. She knows Falklands, which was formed by herself, Veronica Wachiuri and Joseph Kigen and Rakesh Gudka. Its purpose was for manufacturing plastic products and Rakesh Gudka was to procure the raw materials from India. The company however never took off due to some disagreements between the directors. The company was not supposed to hold shares in the suit property. Rakesh Gudka was not a director of any of the two companies. He was there only to purchase raw materials from India. No resolution was made by Reliance to allow Falklands to own the property. She has never signed any sale agreement for sale of half of the property to the defendant. Their company and family lawyer since 2008 is Mr. Kanyi Ngure and he would have been engaged if there was any agreement to be executed. The sale agreement is a forgery. No original has ever been produced. Reliance never received any Kshs. 2,000,000/= as deposit for the sale. The value of the property has appreciated. The sale agreement had a one month stipulated period which was overtaken by events. She is aware of the deposit into an account on 19/2/2014 of Kshs. 15,000,000/= obtained by the defendant. It was not for the transaction of 2010. The transaction targeted by procurement of that sum was different from the transaction of 2010. The plaintiff became aware of the agreement of 15/10/2010 upon its filing in court. She has never approved subdivision plans of any property and she has never signed any documents for application for subdivision of the plot. Reliance seeks mesne profits in terms of Kshs. 200,000/= per month and the claim by the defendant for half a portion of the suit property should be dismissed and the defendant should be evicted.
33. Upon cross-examination by Mr. Ndubi, DW2 stated that due to non-payment by the defendant there was no agreement. She admitted that she was present at the auction. The agreement/understanding of Kshs. 17,000,000/= was arrived at in Nairobi. The mutual understanding was arrived at after the auction. Vejordia through Joseph Kigen caused Reliance to be involved in the auction. The plaintiff evicted the tenants on the other part of the plot and did not evict the defendant and no other case has been filed seeking vacant possession from Vejordia. She was aware of the sale agreement of 15/11/2010 and what the parties orally agreed is what is contained in the agreement. Clause 3(ii) of the agreement states the defendant was to be financed by a Bank. The property is no longer residential but she was not involved in the change of user and subdivision process. Vejordia were to occupy portion "B" on the subdivision plan. The letters to Kanyi advocate from Mutitu advocate referred to plot No. Block 4/54 "B." Her husband processed the transfer. There was a lease registered on 4/5/2011 for James Njuguna Mugo against the title and the plaintiff moved to court to challenge the lease in case No 579/2011 – Naivasha and on 1/5/2015 an order was issued. The plaintiff never sought the services of a document examiner. DW2 denied that she signed the resolution attached to the examiner's report but acknowledged the signature on the witness statement is hers. The one on the memorandum and Articles looks like hers. When shown Metrocosmo valuation report DW2 admitted that there is a new structure on the suit land but she does not know who constructed the structures. In 2015 the structures were there when the valuation was being conducted and the plaintiff never enquired when they were constructed. DW2 was not certain if the plaintiff has complained of the subdivision and change of user. She asserted that she never went to the CID office to record a statement.
34. Under re-examination by Mr. Otieno, DW2 stated that the OB Report regarding the alleged forged agreement was made on behalf of Reliance.



35. DW3, Michael Kanyi Ngure sworn gave oral evidence and adopted his witness statement as part of his evidence-in-chief. He stated that he is an Advocate practicing under name and style of Kanyi Ngure & Co. Advocates in Nakuru. He has been an advocate for Reliance Metal Co. Ltd since 2008 and a family Advocate for the directors since 2008. Reliance has 3 directors – Mukesh Patel, Trushna Mukesh and Rohit Patel. DW3 was not familiar with the directors of Vejordia Garden Villa Ltd. He however made an acquaintance with Joseph Kigen, who had occasion to visit his office, in 2010. On some occasions they met on some evenings for tea with him and Mr. Mukesh. There was no discussion of sale of half portion of the plot but at one meeting Joseph Kigen made a proposal that Garden Villa should be given the option to purchase half of the land as they had a bar and restaurant. The proposal was made about mid-October 2010. He acknowledged receiving the letter of 15/2/2011 which he took to directors of Reliance Metals Ltd who told him to ignore the letter as the defendant had never paid the purchase price. Another letter of 18/3/2011 was sent to him which he also took to the directors who again advised him to ignore it but he felt that it was necessary to respond and thus responded through the letter of 19/4/2011 stating that they had not paid for the half portion and they should seek alternative collateral and that upon that event, a subdivision would occur. On 19/9/2011 he received another letter of 19/9/2011 asking for the way forward to which he responded on 11/10/2011 in the same manner as in the letter of 19/4/2011 and dispatched it by registered post. There was no further correspondence between his firm and Mutitu Thiongo advocate. Nothing featured about a formal sale agreement in the correspondence. His firm wrote demand letters for tenants on the suit property to surrender vacant possession and prosecuted Nakuru HCCC 579 of 2020 for vacant possession. Other tenants vacated from the half of the property but Vejordia stayed on. DW3 withdrew from the dispute as he was aware that he would be a witness. His firm issued a demand notice dated 21/11/2014 to the defendant requiring it to give up vacant possession and as a consequence Mr. Joseph Kigen came to his office asking the way forward and he replied to him that they need vacate the suit premises. When he asked what would happen if they fail to vacate DW3 said litigation would ensue whereupon Joseph said they are ready to go to court.
36. Under cross-examination by Mr. Ndubi, DW3 stated that he used to meet Joseph and Mukesh at Seasons Hotel. In mid-October Joseph proposed purchase by Vejordia of the half of the property. Mukesh said the proposal would be considered long as Vejordia make payments. There were only two meetings at which he was present. He does not recall the presence of a planner or a Surveyor at those meetings. The meetings happened within 2 days or 3 days. He never met Kibowen a Surveyor there. DW3 admitted that in his letter dated 11/10/2011, he was apologizing to the defendant's counsel for failure to respond. The letter dated 11/10/2011 has a certificate of posting on its face showing that it was sent by registered mail while the letter of 19/4/2011 lacks a certificate of posting yet the two letters are exactly the same in content. He maintained that the letter of 19/4/2011 was not backdated for the purposes of this case. He never acknowledged receipt of the letters sent to him even by email. He admitted that it is misconduct for a lawyer to act without instructions. He stated that his firm has a delivery book not a correspondence register. He stated that he expects a letter to be stamped as acknowledged in receipt but the letter of 19/4/2011 is indicated as "signed but refused to sign." There is no signature by Vejordia. He filed this case in 2015 and sought, inter alia, eviction orders. No one insisted that he withdraws from the dispute and he merely handed over the file to Mr. Otieno voluntarily. He and, Mukesh went to the CID Office. Evans Kipchenger was summoned by the CID. Even Lawyer Ndubi went to the CID office. DW3 denied the insinuation that he bribed CID officers. Joseph Kigen only came to DW3's office after a demand letter was sent to the defendant.
37. At that point the defence case was marked as closed and parties were ordered to file final submissions.



Analysis And Determination

38. This court has considered the pleadings the evidence and the submissions of the parties in the consolidated case. The issues arising for determination in the opinion of this court are as follows:
- a. Was there an enforceable agreement made between the parties for sale of half of Nakuru Municipality Block 4/54 to the defendant?
 - b. Whether in the circumstances of this case the court should order specific performance and award general damages for breach as prayed by the defendant;
 - c. Is the defendant a trespasser on the suit land and liable to be evicted?
 - d. Is the defendant entitled to damages for breach of contract?
 - e. Should the plaintiff be awarded mesne profits?
 - f. Who ought to bear the costs of the suit?
39. Regarding the first issue two sub-issues are to be examined: whether or not it has been proved by the plaintiff that the agreement is a forgery and secondly, whether the agreement is null and void for not having met the requirements of the law.
40. The plaintiff submitted that the agreement produced by the defendants is in violation of Sections 3(1) of the *Law of Contract Act* and Section 38 of the *Land Act* with regard to failure to bear the names and identity card numbers of the signatories, names of directors of the two companies, lack of a company resolution. The agreement was also impugned on the basis that the attesting advocate did not have a certificate of official search for the suit land, that no title was produced at the execution, that it bore no company seals. The case of *Queens Pharmaceutical Ltd V Rup Pharm Ltd (2002) 1 eKLR 372* was cited in this regard. The further argument of the plaintiff is that the agreement dated 15/11/2010 was a forgery and that the defendant failed to produce the original agreement despite service of a notice to produce dated 26/11/2018. The plaintiff lamented that no letters to Equity Bank and to Cheptumo Advocates, who could have been holding the original and counterpart respectively of the agreement, requesting to be furnished with such original or counterpart, were produced. The plaintiff stated that failure to produce the original document meant that the same was questionable, and that the court is entitled to make an adverse inference that the document was not a valid and enforceable document. The document examination report was also challenged on the basis that the examiner had retired from the service, that there are many government forensic examiners who are still in service and the examiner contracted by the defendant was not an independent witness; citing *Iskorostinskaya Svetlana V Gladys Naserian Kaiyoni [2019] eKLR, 3*, the plaintiff asserted that in the task that the examiner in this case carried out it was necessary to examine original documents bearing original markings or signatures; that as per *James Gitingu Wamagata & Another V David Migichi Kageni [2015] eKLR* the best evidence for examination purposes is always the original documents. The plaintiff also cited the cases of *Stephen Kinini Wangonde V The Ark Ltd 2016 eKLR* And *Akute V Republic [2006] 1 eKLR 488* and urged that evidence from expert witnesses was not binding on the court and the court must always evaluate the expert evidence in relation to the facts of the case together with the other evidence given and thereafter form its own opinion; citing *David Musyimi Ndeteti T/A Oasis Mineral Water Co & Another V Safepak Ltd [2005] eKLR* the plaintiff urged that the court must consider every document produced in evidence and make a conclusive analysis on the relevance and import of the document in relation to the issues arising from the case. Citing the case of *Kenneth Nyaga Mwigie V Austin Kiguta & 2 Others [2015] eKLR* which emphasizes that mere admission of a document in evidence does not amount to its proof, and that a court, in forming a judicial opinion as to whether a



document has been proved or disproved, should look at the document as well as take consideration of all facts and evidence on the record. In the circumstances of the present case the plaintiff concluded, there was no valid sale agreement that could be enforced between the parties.

41. On its part the defendant, without citing as much authority as the plaintiff, relied on the facts, the sequence of events leading up to the execution of the agreement and the events that followed thereafter, as well as admissions by the plaintiff's witnesses during the trial, as credible evidence of the authenticity of the impugned agreement. It simply reiterated the evidence given at the hearing and submitted that it is common ground that there was an agreement or understanding that after the purchase of the property by auction the plaintiff was to sell half of it to the defendant; that the evidence of plaintiff's witnesses and defence witnesses concurred that the purchase price was Kshs 17,000,000/= and that the agreement was arrived at immediately the bid by the plaintiff succeeded; that there is evidence that on 17/8/2010 the plaintiff's agents and the directors of the defendant alongside one Rakesh Gudka incorporated Falklands for the purpose of purchasing the property; that it is common ground that it was PW1's husband who approached the plaintiff's directors with the proposal of joint purchase of the property at the auction. The defendant also averred that the parties' versions differ only at the point of whether the agreement was put down into writing. The defendant maintains that a lawyer, PW5, testified that he prepared the agreement and witnessed the execution thereof by the directors of the parties and his evidence was uncontroverted; that the document examiner's report was to the effect that the signatures on the agreement must have been affixed by the directors of the plaintiff; that the agreement was executed by the parties and PW1 took various documents to Equity Bank which included a copy of the passport of DW2 and the sale agreement in support of the defendant's application for a loan to finance the balance of the purchase price; that by P. Exh 6 (a letter from Equity bank) the loan application was approved; that following agreement between the parties PW2 was allowed to follow up on the tasks of change of user and subdivision of the suit property. The plaintiff concluded by stating that absence of a company seals of the parties on the agreement was not proof that it was a forgery. The plaintiff cites Section 37 of the *Companies Act* to the effect that a document is validly executed by the company if it is signed on behalf of the company by 2 authorized signatures or by a director of the company in the presence of a witness who attests the signature. Further it asserted that DW1 admitted in cross-examination that the signatures on the agreement looked like the signatures of the plaintiff's directors. The defendant also leaned heavily on the fact that DW1 admitted that by her signature DW2, his wife, was one of the persons who had on behalf of the plaintiff authorized the processes of joint subdivision and planning of the property; that DW1 admitted that no other consent to transfer the property to the plaintiff was obtained save the one exhibited by the defendant, which was obtained by Ndubi advocate on the instructions of PW2, and stated that if there had been no agreement there would have been no need for PW2 to undertake processing of title; that DW1 and DW2 agreed that what was verbally agreed between the parties herein is what was contained in the impugned agreement; that the plaintiff never filed suit for eviction of the defendant in 2011 when it was proceeding in court for orders of eviction against the tenants who had occupied the other half of the property. The defendant urged that the plaintiff has not made out a good case for fraud since though it was incumbent upon the plaintiff to establish by way of an opposing document examiner's report that the signatures on the agreement were not authentic, it never brought such proof of its allegation to court, yet according to *Demutilla Nanyama Purumua V Salim Mohamed Salim [2021] eKLR* it is trite law that any allegations of fraud must be pleaded and strictly proved. On the strength of those submissions the defendant concluded by stating that the sale agreement authentic and enforceable.
42. In determining the first issue this court is inclined to adopt the line of reasoning in both parties submissions which complement one another a great deal: the plaintiff's argument that as per David Musyimi Ndeteti (supra) the court must consider every document produced in evidence and make



a conclusive analysis on the relevance and import of the written agreement in relation to the issues arising from the case and the fact that all the evidence of the parties points to the fact that there was an oral agreement between the parties, and that the events occurring both before and after the auction do point to the fact that unless the contrary evidence is provided, the written agreement is genuine and its original was executed by the parties' agents. This court is inclined to agree with the assertion by the defendant that it was upon the plaintiff, having pleaded fraud to present evidence of such fraud. In the case of *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* [2013] eKLR it was stated as follows:

“In *R. G. Patel vs. Lalji Makani* (1957) E.A. 314, the predecessor of this Court at pg 317 held:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs. Nyati* (1984) KLR 425, at pg 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”. We find that the appellant did not prove fraud on the part of the respondents.”

43. It has long since been the established rule that courts can rely on secondary evidence where primary evidence can not be availed. Section 68 of the *Evidence Act* states as follows:

“Section 68 - Proof of documents by secondary evidence

(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—

(a) when the original is shown or appears to be in the possession or power of—

(i) the person against whom the document is sought to be proved; or

(ii) a person out of reach of, or not subject to, the process of the court; or

(iii) any person legally bound to produce it,

and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;

(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;”

44. In the present case the defendant's evidence is that the original agreement was availed to Equity Bank alongside other documents for the purpose of processing credit to enable it pay the balance of the purchase price. The defendant adduced evidence in the suit before the plaintiff. The advocate who made the agreement produced the copy in evidence as an exhibit. The first two defence witnesses admitted that the contents in the copy of agreement so produced by that advocate reflected what the parties had orally agreed.

45. Therefore, having regard to the strength of the defendant's evidence, whether the original agreement was produced or not, I find the plaintiff was required to establish that the signatures on it are forged.



The plaintiff's counsel attempted to discredit the evidence through cross-examination by pointing out that the original agreement was not available for examination of the signatures thereon against the known signatures of the plaintiff's directors. It has been conceded that there was no correspondence showing that the defendant had attempted and failed to procure the original agreement from Equity bank or its counterpart from Cheptumo advocate who had drawn the same, and the plaintiff emphasized the rule that admission of a document into evidence should not be confused with proof of a document and this court agrees with that assertion fully. However, this court considers that the whole issue was finally settled by the evidence of PW 5 who testified that he had prepared the document and that the directors of the parties had appeared before him for the purpose of, and that he had witnessed them, affixing their signatures to the agreement. This court has considered the evidence of PW5 and in its view the same was not controverted or shaken in cross-examination and this court accepts it as credible. There was no expert evidence emanating from the plaintiff regarding the signatures on the agreement and proving them a forgery. This is an aspect of this case that does not depend on what the plaintiff's directors think or say but on expert evidence of forgery. The only party who presented such expert evidence is the defendant and it was to prove the agreement authentic and it was uncontroverted. The conclusion this court therefore draws from the evidence of the parties taken conjunctively is that the agreement was indeed made and executed by the parties and that it is not a forgery.

46. The second question that arises is whether the defects pointed out by the defendant regarding the agreement render it void and unenforceable. On that issue the plaintiff has urged that the agreement breached Sections 3(1) of the Law of Contract Act and Section 38 of the Land Act as it fails to bear the names and identity card numbers of the signatories, names of directors of the two companies, company seals and resolutions, lack of a certificate of official search for the suit land, and failure to produce the title at the execution thereof.
47. However, regarding the plaintiff's reliance on Sections 3(1) of the Law of Contract Act and Section 38 of the Land Act it must be simply reiterated that by his evidence PW5 owned up to the preparation and attestation to the signatures of the parties' agents whom he identified by name and by description. That one party to the agreement has identified their signatures on the document is sufficient to put the document on a time continuum within the sequence of events leading up to its execution; on that basis this court has indeed found that the document was executed by the directors of the named plaintiff and defendant company and that has concluded the issue of any challenge to the agreement under the provisions of Section (3)(1) and Section 38 of the Law Of Contract Act and the Land Act respectively.
48. Regarding the lack of company seals on the document, this court notes that it was mutual. Neither the plaintiff's directors nor the defendants' affixed any seal upon the document. However, this court is persuaded, as argued by the defendant, that Section 37 of the Companies Act is applicable in the present case to the extent that a document is validly executed by the company if it is signed on behalf of the company by 2 authorized signatures or by a director of the company in the presence of a witness who attests the signature. There is no provision for the mandatory affixing of a company seal in Section 37. It is the conclusion of this court that by the conduct of the parties, which must be taken in conjunction with the provisions of the written contract, they intended to create legal relations between them. The alleged defects pointed out by the plaintiff lack consequence as the plaintiff has conceded that it allowed the defendant to remain in possession of the suit property which possession must only be construed to be due to the desire to complete the agreement between them. The same reasoning applies to lack of insistence on or the obtainance of a certificate of official search; there is considerable evidence of trust and collaboration between the parties to the extent that PW1 was allowed to process the title and the subdivision and change of user of the suit property. Much of what had been agreed upon by the parties



had been accomplished by the time the plaintiff lodged the present suit. In *D & C Builders vs Sidney Rees* (1966) 2 QB 617 Lord Denning, M.R. stated: -

“It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.”

49. In *John Mburu v Consolidated Bank of Kenya* [2018] eKLR the appellant borrowed Sh.440,000 from Home Savings & Mortgages Ltd (HSML), one of the failing financial institutions that were later absorbed in the respondent Bank. Twenty years later, the loan had not been repaid and had in fact ballooned to Kshs. 13,402,086.45. The bank issued a statutory notice in an effort to recover the outstanding sum together with interest thereon at the rate of 20.5% p.a. but the auction that was scheduled was not successful. Thereafter the appellant approached the bank for renegotiation of the sum due and offered to pay Ksh.2 million in full settlement to redeem the mortgage. On 20th April, 2004 the bank counter-offered to accept Ksh.6.5 million in full settlement if it was paid on or before 23rd April, 2004. The appellant revised his offer to Ksh.5.5 million which the bank rejected and counter-offered to accept Ksh.6 million on condition that Ksh.5 million was paid by 30th April, 2004 and the balance of Ksh.1 million 30 days thereafter, in default of which the security would be auctioned. The appellant, through his advocates, accepted the counter-offer by the bank and agreed to pay the sum of Ksh.6 million if the bank undertook to release the security documents and execute a re-conveyance of the mortgage upon sale of the security by private treaty and the matter was settled on the terms agreed by the parties, only for the appellant to claim subsequently that the settlement amount was paid hastily under duress as he was apprehensive that the property would be auctioned at a throw away price. He recalculated the amount due to the bank on the basis of the mortgage instrument and came up with a figure of about Ksh.3.4 million as the sum due to the bank, which meant that he had overpaid it by about Ksh.2.6 million which the bank denied. the appellant sued for overpayment based on unlawful variation of interest rates and the mode of interest calculation from annual to monthly alleging fraud, misrepresentation, negligence and unjust enrichment, against the bank. The court stated held as follows in the case of *John Mburu* (supra):

“In view of the binding nature of the settlement agreement, the appellant was obligated to pay that which he paid under the deed of settlement. Unjust enrichment would not arise as the appellant consented to pay the said amount and voluntarily executed the agreement to pay the stated sum. All said and done, the negotiations between the parties were not vitiated by duress as claimed by the appellant and we so find....

“By his words or conduct, he led the bank to believe that he was intent on settling the debt at such amount as may be agreed on terms that the bank releases the security held by it to the appellant. It would be unjust or inequitable to allow the appellant to go back on the agreement concluded in that process.”

50. The parties in the present litigation had physically implemented the terms of their written contract on the ground and vide vital and far-reaching formal alteration of documentation and records in government land offices to such a great extent that lack of company seals and resolutions was no longer a valid consideration and neither should it now be before this court. Similarly, the absence of certificate of official search for the suit land, and failure to produce the title at the execution thereof evinced the



deep trust relationship between the parties and on that basis alone none of them can be allowed to back-pedal on the very agreement they had affixed their signatures on and partially implemented. In this court's view, the plaintiff is estopped by its conduct from reneging on the agreement. In this court's opinion the agreement is enforceable.

51. Lastly, the plaintiff argued that Clause 8.2 of the agreement provided for issuance of a 14-day completion notice to a defaulting party to regularize its position whether time was of essence or not in the agreement. The completion date ended on 15/12/2010 without such notice being issued by either party and so according to the plaintiff, the agreement is not enforceable by either party.

52. In the case of *Arnold Wabwile Lutalala v Peter Sane Lepatai* [2018] eKLR it was observed as follows:

“According to the Law Society of Kenya conditions of Sale, at clause 4 (4) it requires that the vendor should serve the purchaser twenty-one (21) day notice to complete a contract before the same can be rescinded. Further, a defaulting party has to be given ample notice for rescission of contract. Since the Defendant never gave the Plaintiff notice for rescission of contract and continued to receive the purchase price, it is my considered view that he is hence estopped from claiming that the Sale Agreement had lapsed.”

53. It must be stated here that a rescission process by way of notice to complete must be commenced by at least one party. Where no such notice to complete has been issued, one party can not gain undue advantage over the other by claiming that its adversary never gave any notice of completion whether before or after the completion date and that thus the agreement has lapsed. It was for the plaintiff if it wished to rescind the contract between it and the defendant to write a notice to complete to the defendant after which it could upon default by the defendant issue a notice of rescission. In this case the plaintiff never rescinded but only varied the agreement both by conduct and in writing when it refused to submit the completion documents for use in securing the balance of consideration and also when its lawyer wrote to the defendant's lawyer indicating that the defendant should obtain an alternative security. The plaintiff has noticeably attempted to escape the effects of their lawyer's letter of variation of terms by claiming that he was not handling the transaction for them and that the joint lawyer for the parties was Cheptumo & Company advocates. But the plaintiff's action in this transaction was conscious and driven by a particular motive. The advocate for the plaintiff, an officer of this court testified under oath and can not be said to be lying when he stated that he acknowledged receiving the letter of 15/2/2011 which he took to directors of Reliance Metals Ltd who told him to ignore the letter as the defendant had never paid the purchase price; also when he stated that another letter of 18/3/2011 was sent to him which he also took to the directors who again advised him to ignore it but he felt that it was necessary to respond and thus responded through the letter of 19/4/2011 stating that they had not paid for the half portion and they should seek alternative collateral and that upon that event, a subdivision would occur; the letters he received and the letter he wrote in response are at the heart and soul of the present dispute and are determinative of the option that the plaintiff took to evade its responsibilities under its agreement with the defendant. That its advocate admitted at the hearing that his principal had advised him to ignore the correspondence from Mutitu Thiongo Advocates is a serious thing and is actual proof that it is the plaintiff who attempted to turn its back on the agreement. However, the defendant never gave up and sought alternative collateral and secured the funding for the balance and thus possibly salvaged itself from being blamed for breach.

54. The second issue is whether in the circumstances of this case the court should order specific performance and award general damages for breach as prayed by the defendant. The Court of Appeal in the case of *Millicent Perpetua Atieno Vs Louis Onyango Otieno* (2013) eKLR quoted with approval



the case of *Reliable Electrical Engineers Ltd. V Mantrac Kenya Limited* (2006) eKLR where the court stated:

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles”

55. The court in *Millicent Perpetua Atieno* (supra) went on to state that:

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

56. The real question that will guide the court in this case is whether there was compliance with the terms of the agreement by both parties, and it has been partially addressed herein before.

57. The plaintiff goes to great length to raise an argument to establish that there is no proof that the defendant had paid to the plaintiff the sum of Kshs 2,000,000/= and owing to that therefore the agreement is not binding on it. This argument fails for two reasons: first, that this court having found that the agreement was valid and not a forgery will not accept that argument because this court can only go by the terms of the agreement and the acknowledgement of receipt of that sum is on the face of the agreement itself.

58. To accept oral evidence contradicting the express terms of a contract is unusual in law. in the case of *Twiga Chemicals Industries Limited v Allan Stephen Reynolds* [2014] eKLR the court observed as follows:

“The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. As quoted in the case of *SAVINGS AND LOAN KENYA LIMITED V MAYFAIR HOLDINGS LIMITED*, [2012] e-KLR:

“...the object of construction of terms of a written agreement is to establish there from the intention of the parties to the Agreement which must be approached objectively. The question in this appeal is not what the appellant or the respondent meant or understood by the words used but the meaning which the particular clause would convey to a reasonable person having all the background information that was available to the parties at the time of the contract.”

59. *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another*, Civil Appeal No. 35 of 1999 (UR) (C.A.) is authority for the legal rule that a court of law cannot re-write a contract between the parties as the parties are bound by terms of their contract unless coercion, fraud and/or undue influence are pleaded and proved. Chitty on Contract 29th Edition Vol. 12 states as follows:

“It is often said to be a rule of law that if there is a contract which has been reduced to writing, verbal evidence is not to be given..... so as to add or subtract from, or in any manner to vary



or qualify the written agreement..... The rule is usually known as “parole evidence” rule. Its operation is not confined to oral evidence. It has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation.”

60. Consequently, the ordinary meaning the agreement conveys to this court is that the sum of Kshs. 2,000,000/= was paid to the plaintiff’s agents, partly before and partly after the execution of the agreement hence the express acknowledgement thereof in the agreement.
61. The further term of the agreement was that the balance of Kshs 15,000,000/= would be financed by way of a bank loan and payment would be made within 14 days of a successful registration of charge in favour of the bank in respect of the portion being bought and a new title issued in the name of the purchaser as per the terms set out in that professional undertaking. However, there was no provision for the period within which the relevant professional undertaking for the payment of the balance of the consideration would be issued. The same would necessitate surrender of the completion documents to the purchaser’s advocates. It further stated that Clause 8.2 provided for issuance of a 14-day completion notice to a defaulting party to regularize its position whether time was of essence or not in the agreement. The completion period ended on 15/12/2010 without such notice being issued by either party and so according to the plaintiff, the agreement is not enforceable by either party. It cites the cases of William Kazungu Karisa V Cosmos Angere Chanzera [2006] eKLR and Sammy Ndungu Mungai V Daniel Macua Ndonga & 2 Others [2013] eKLR. The plaintiff’s case is that the purchaser’s advocates gave a professional undertaking to the firm of Kanyi Ngure & Co advocates instead of Cheptumo & Co Advocates vide letters dated 9/2/2011 15/2/2011, 8/4/2011 and 19/9/2011 yet these were not the vendor’s advocates in the transaction. It further stated that Kanyi Ngure responded to those letters on 19/4/2011 and 11/10/2011 though Kanyi had not been informed of the existence of the written agreement.
62. To counter the plaintiff’s argument, the defendant simply stated that there was no condition in the agreement that the sum of Kshs 17,000,000/= would be paid within 60 days; that the condition was that payment of the balance would be effected within 14 days from the date of the registration of a charge in favour of the Bank in respect of the portion of land bought by the plaintiff.
63. According to the defendant its advocate was seeking to be given the title documents for the portion purchased to enable them prepare instruments of charge in favour of the bank hence the correspondence to Kanyi Ngure Advocates. The defendant’s case is that since the plaintiff refused to release the certificate of lease after completion of subdivision, the defendant could not therefore have anything to forward to the bank for the purpose of security for the charge. Finally, the defendant’s directors decided to use alternative property as security for a loan to finance the balance of the consideration. They further state that even when the credit was secured they could not pay it to the plaintiff since the plaintiff was non-committal and the money has since been deposited into an account on the orders of this court. The defendants point out that when the plaintiff’s lawyer was cross-examined on why he never responded to the letters from Mutitu Thiongo & Co Advocates, he stated that he was awaiting instructions from his client.
64. It is the defendant’s case therefore that the plaintiff frustrated the defendant’s attempts to charge the portion that it had bought to a banking institution to secure funds with which to pay the balance, but nevertheless the defendant was able to charge an alternative property and obtain those funds. It states that on the evidence provided the orders of specific performance are warranted and relies on Toshike Construction Company Ltd V Harambee Cooperative Savings and Credit Society Ltd 2021 eKLR and Sisto Wambugu V Kaku Njuguna [1983] eKLR which espouse the position that specific performance is an equitable remedy and also that a party can not obtain such orders unless they had performed their part of the bargain.



65. In this court's view there are four vital observations to be made at this juncture. One is that there is considerable evidence that the defendant bent over backwards and attempted to obtain credit from the bank to finance the balance of the consideration before the flurry of communications ensued between the law firms said to be representing the parties. When it became impossible to obtain the title documents to the portion that it bought in order to charge it to the bank and obtain the balance of consideration it obtained an alternative property and secured the funds. The second observation is that contrary to the plaintiff's submission, Kanyi Ngure advocates must be presumed to have been representing the plaintiff in the transaction. This second observation is borne out of the fact that first PW3 admitted that he failed to respond to the letters sent by Mutitu Thiongo Advocates because he was awaiting the plaintiff's instructions. The issue of whether Kanyi had been informed by the defendant of the existence of the written agreement between the parties is irrelevant. I state this because none other than the plaintiff's directors could have directed the defendant to Kanyi Ngure in respect of the transaction. It is such an improbable coincidence that, assuming that the plaintiff never introduced Kanyi Ngure to the defendant, the defendant decided to deal with Kanyi Ngure and later on it turned out from the evidence of the plaintiff's directors and Kanyi himself that he was their trusted lawyer of many years. The third observation is that so much work including transfer to the plaintiff, planning and subdivision tasks had been done by both parties towards the completion of the agreement before the plaintiff appeared to balk at releasing the documents of title that would enable the defendant charge its portion to the bank and so pay the consideration using the proceeds. Some of the tasks bore hallmarks of express and implied participation and approval of the plaintiff so much that by the time the plaintiff appeared to have turn its back on the transaction, the necessary planning authority approvals and consents had been obtained and the land was already subdivided into two parts. Of all the events that occurred that showed that parties went along with the terms of the agreement for a long time is the subdivision about which process the plaintiff raised no demur. No claim has been made that the land was wrongfully subdivided by or at the instance of the defendant. DW2's statement denying that she executed the subdivision application was contradicted by her own husband's evidence; unlike the agreement, the subdivision application was not reported to the police as a forged document; the question arises as to how the plaintiff's land could be subdivided on the basis of a false signature while they kept silent. Wahome Werugia, Licensed Surveyors were instructed by the Plaintiff and the fees that firm charged for subdivision was shared equally by the parties herein. The consent to transfer the land to the plaintiff was obtained by the defendant whose agent followed it up just as he did the subdivision and change of user processes. In short, the parties undertook all that was supposed to be done under the agreement except that the plaintiff failed to release the title documents to enable registration of a charge over the portion bought by the defendant. Nevertheless, the defendant has established that it obtained alternative means of funding and that even as this case proceeds, it is quite ready to pay the balance of consideration. Under those circumstances this court finds that the plaintiff was in breach of the agreement for failing to release the title documents, probably thinking that the refusal would cripple the whole transaction, with the sequel that became the filing of this suit for inter alia orders of eviction signifying that it wanted the entire parcel including the one that it had earlier on agreed to sell to the defendant, for itself. It is the plaintiff who has come to court with unclean hands. By their advocate's letter the plaintiff unilaterally amended the terms of the agreement between it and the defendant and sent the defendant hunting for alternative collateral. The defendant did not demur to such amendment of terms; the defendant went to great lengths, after the plaintiff refused to allow the suit land to be charged for the purpose of obtaining the balance of consideration, to obtain alternative collateral as advised by the plaintiff's lawyer and finally obtained the much needed funds to pay the balance. This court has considered the fact that considerable inconvenience would be occasioned to the defendant in the event an order of specific performance does not issue for the sole reason that on the basis of a tacit agreement between it and the plaintiff it proceeded to construct a kitchen on the



premises at its own expense. In this court's view the defendant has met its part of the bargain and has clean hands and therefore deserved the equitable relief of specific performance.

66. As to whether the defendant is a trespasser on the suit land liable to be evicted, the question has been answered by the finding that the defendant is on the suit land by virtue of an enforceable agreement executed between it and the plaintiff regarding whose terms it has complied. For that reason, it can not be deemed a trespasser.

67. Mesne profits must be pleaded and proved as stated in the case of Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR quoted in the case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR where the Court of Appeal stated as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

68. The plaintiff pleaded mesne profits to the sum of Kshs 200,000/= per month from January 2011 till the date of surrender of vacant possession. However, it is trite that mesne profits can not be claimed against a person who is rightfully on the suit property by virtue of an agreement that the parties have executed. In Christine Nyanchama Oanda (supra), the court stated as follows regarding the nature of mesne profits:

“Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition).”

69. This court does not consider the plaintiff to have suffered any loss because the defendant had always been entitled to its half of the suit property which it has been in occupation of before the plaintiff happened into the scene and that the agreement between parties regularized the defendant's occupation while other tenants were being evicted by virtue of court orders or compelled to leave by notices to vacate. The defendant's occupation was thus not wrongful. Even assuming that the agreement was found to have lapsed which is not the case, the plaintiff's choice of date of commencement of computation of mesne profits, January 2011, is clearly inappropriate since by 2014 the subdivision process was still being pursued by the parties to enable completion of the agreement; it is therefore doubtful that having regard to the trust nature of the parties' relationship and the plaintiff's tacit consent to the defendant's occupation and construction on the premises would have permitted such an award of mesne profits to be made in the plaintiff's favour. The delay in completion having been occasioned by the plaintiff the loss it has suffered is a self-inflicted pain and the claim for mesne profits must be dismissed.

70. Regarding damages for breach of contract claimed by the defendant, the Court of Appeal has held in several cases that general damages are not awardable for breach of contract. For instance in the case of Consolidated Bank of Kenya Limited v Ken Muriuki & Peter Kirimi Mbogo t/a Mbogo & Muriuki Advocates [2021] eKLR it was stated as follows:

“

“12. This appeal however is mounted upon the general principle of law that general damages are not ordinarily awardable for breach of contract. That principle is not new but well established and indeed trite. The Court of Appeal in Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 eKLR,



affirmed the general rule that general damages are not recoverable in cases of breach of contract. The rationale for that rule was explained by the court in the case of *Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)* eKLR to be: -

“the next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract, subject to mitigation of loss, is to put the claimant as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitutio in integrum*. The measure of damages as established in the case of *Hadley v Baxendale (1854)* 9. Exch. 341 is such as may be fairly and reasonably considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach.”

71. In any event the fact that the defendant has been utilizing the suit land just as it would have perchance the transfer of title to it had succeeded, considerably mitigates or completely eliminates the claim for general or other damages. Thus this court will not award the defendant any damages for breach of contract.
72. On the issue of costs, I find that it is the conduct of the plaintiff that halted the process that the parties had commenced. Had the plaintiff accepted an undertaking offered in the matter by Mutitu Thiongo Advocates vide a letter in February 2011 and transmitted the completion documents to enable the registration of a charge in favour of Equity bank over half of the suit property the process would have been complete by April or May 2011 given the rapid progress the parties had made since the auction in October 2010. I find no reason why the plaintiff should not bear the costs of the present suit.
73. In the end I find that the plaintiff has failed to establish its claim against the defendant and that the defendant has established its counterclaim against the plaintiff. I therefore enter judgment in favour of the defendant against the plaintiff and I issue the following final orders:
 - a. The plaintiff's claim in the two consolidated cases is hereby dismissed;
 - b. The defendant's counterclaim is allowed in the following terms:
 - i. An order for specific performance is hereby issued compelling the plaintiff to have the agreement dated 15th November 2010 completed by transferring half of the land parcel known as Nakuru Municipality Block 4/54 (which is the subdivision assigned the number Nakuru Municipality Block 4/471 and which is occupied by the defendant) to the defendant within 60 days from the date of this judgment;
 - ii. The sum of Kshs 15,000,000/= deposited in the joint account held by the plaintiff's and the defendant's advocates in connection with the suit premises shall be released to the plaintiff within 30 days of this judgment and thereafter the order of specific performance issued in order no (b)(i) herein above shall be complied with by the plaintiff in default of which the Deputy Registrar of this court shall execute all the documents requisite for the transfer of half of the land parcel known as Nakuru Municipality Block 4/54 (which is the subdivision assigned the number Nakuru Municipality Block 4/471 and which is occupied by the defendant) to the defendant;
 - iii. An order of permanent injunction is hereby issued to restrain the plaintiff from entering onto, trespassing or interfering in any manner with the Plaintiff's quiet and peaceful occupation of half of the land parcel known as Nakuru Municipality Block



4/54 (which is the subdivision assigned the number Nakuru Municipality Block 4/471 and which is occupied by the defendant);

- iv. The plaintiff shall bear the costs of this consolidated suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

